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IN THE

SUPREME COURT

OF THE UNITED STATES

October Term 1906

No. 402.

THE MONTANA MINING COMPANY, LIMITED,
Plaintiff in Error,

vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Defendant in Error.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

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JURISDICTION.

To sustain the claim that this court has jurisdiction to review the case upon a writ of error, reference is made to the original complaint, which was not a part of the record before the circuit court of appeals. It is argued that the original complaint stated a cause of action for trespass.

If the action should be considered as an action for a trespass it was not essential to the statement of the

plaintiff's claim or cause of action to describe the vein with reference to the boundaries of the St. Louis claim, and without such description the alleged federal questions would not be disclosed by the complaint.

Sec. 2322 of the Revised Statutes provides:

> "The locators of all mining locations * * * shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges, throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside of the vertical sideline of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges."

Mr. Lindley in his work on Mines, 2d Ed., Vol. 2, Sec. 615, says:

> "Whenever the extralateral right of an apex propritor is challenged he is called upon to establish,—
>
> "(1) The existence of an apex within his boundaries to the extent necessary to cover the disputed segment of the vein;
>
> "(2) The identity and continuity of the vein from its top or apex within his own boundaries to the point in dispute."

He further says in the same section:

> "It will be sufficient if the apex is shown to the

extent that is necessary to cover the underground portion of the vein in dispute within the end line bounding planes."

The presumption obtains that the owner of a mining claim, in which the apex of a vein is shown to exist, is the owner of the vein and all ore therein contained.

Lindley on Mines, 2d Ed., Vol. 2, Sec. 866.

It was sufficient, then, for the plaintiff, in stating its claim, to allege that the ore was extracted from a vein which has its apex within the surface boundaries of the St. Louis claim and from between the end line planes of such claim. The allegation contained in the original complaint that the vein passes out through a side line is surplusage, and cannot be considered in determining the question of jurisdiction.

The alleged federal questions relied upon by plaintiff in error are stated as follows:

"When a vein enters and departs from the same boundary line of a mining claim, is such vein entitled to extralateral rights?

"When the apex of a wide vein crosses the boundary line of the claim at an acute angle can the miner within whose surface boundaries the apex is found follow it extralaterally beyond the point where he has the whole of the apex within his surface boundaries?"

(See brief for plaintiff in error, pp. 58 and 59.)

Neither of these questions are disclosed by the original complaint.

In the original complaint it is alleged that the plaintiff is a corporation, duly organized and existing under the laws of the State of Montana, and that the defend-

ant, the Montana Mining Company, Limited, is a corporation, duly incorporated and organized under the laws of the kingdom of Great Britain. No allegation is made with reference to the citizenship of the other defendants. Before the case was tried, however, the action was dismissed as to all the defendants except the Montana Mining Company, Limited. This was clearly permissible.

Horn v. Lockhart, 17 Wall. 570.

We therefore submit that whether the jurisdiction of the circuit court is determined from the original, or the second amended and supplemental complaint, it depended entirely upon the allegation that the plaintiff is a citizen of the United States, and that the defendant, the Montana Mining Company, Limited, is an alien.

MERITS OF CASE.

The original complaint was filed Sept. 16, 1893. The complaint in what is referred to as the "specific performance case" was filed Sept. 5, 1894. The judgment of the supreme court in the specific performance case was affirmed by this court, Oct. 31, 1898. The amended and supplemental complaint was filed Nov. 21, 1898. The second amended and supplemental complaint was filed June 26, 1899.

In the original complaint the plaintiff asserted possession and ownership of the St. Louis claim as patented. The compromise strip contained a portion of the apex of the segment of the vein to which the plaintiff was asserting possession and ownership. The Montana Company could not rely upon its equitable title to the compromise strip as a defense to this action at law, and resorted to an independent suit to acquire the legal title.

Pending the determination of the specific performance case the action at law was permitted to rest. After the determination of the specific performance case the second amended and supplemental complaint was filed, in which it is alleged, in paragraph 2, that the plaintiff

> " • • • was, and now is, the owner of, entitled to, and in the actual possession and occupation of that certain quartz lode mining claim known as the St. Louis quartz lode mining claim, and of the quartz, rock and ore and precious metals contained in any and all veins, lodes and ledges of mineral bearing rock through their entire depth, the apex or apexes of which lie within the surface lines of the said fractional portion of the said St. Louis lode mining claim, although such veins, lodes or ledges may so far depart from a perpendicular in their downward course as to extend outside of the vertical side line of the surface of the said St. Louis quartz lode mining claim." (Record p. 2.)

Then follows a description of the St. Louis claim by courses and distances, as per the description in the patent. After such description the following appears:

> "Save and except that portion thereof known as the 30-foot strip or compromise ground which belongs to and is a part and portion of what is known and designated as the Nine Hour lode mining claim." (Record, p. 3.)

Paragraph 3 reads as follows:

> "That the said defendant the Montana Mining Company, Limited, is and was the owner of what is known and designated as the Nine Hour quartz lode mining claim, situate and being east of the said St. Louis lode mining claim, and including the 30-foot strip or compromise ground aforesaid, and that the discovery, location and recordation of the said St.

Louis lode mining claim and the United States patent therefor was made prior to the discovery, location and recordation and patent to the said Nine Hour lode mining claim." (Record, p. 3.)

In the answer the allegations contained in paragraphs 2 and 3, are expressly admitted. (Record, p. 7.)

It thus appears that the defendant, by its answer, admitted: (1) That the plaintiff is the owner and in possession of the St. Louis claim as described in the second amended and supplemental complaint; (2) that the plaintiff is the owner and in the possession of the ore and precious metals contained in any and all veins, lodes and ledges of mineral bearing rock, through their entire depth, the apexes of which lie within the surface lines of the St. Louis claim, although such veins, lodes or ledges may so far depart from a perpendicular in their downward course as to extend outside of the vertical side lines of said claim; (3) that the compromise ground, as described in the second amended and supplemental complaint, was a part of the Nine Hour claim; and (4) that the St. Louis claim, as described, was located prior to the location of the Nine Hour claim.

In view of these admissions, the proof offered to show that a part of the St. Louis claim was located subsequent to the location of the Nine Hour, and that the compromise ground is not correctly described, was properly rejected.

What was said at the argument of the case by counsel for plaintiff in error, with reference to the boundaries of the St. Louis claim having been changed after the application for a patent and after the making of the compromise agreement, was not authorized by the record, and has no foundation in fact. The compromise agreement, the judgment in the specific perform-

ance case, and the deed, all describe the compromise ground as it is described in the second amended and supplemental complaint, and this description is admitted by defendant in its answer to be correct. The compromise ground consists of a strip of land thirty feet wide and is said to contain an area of 12,844.50 square feet. The proof offered was for the purpose of showing that the west boundary line of the compromise strip should be nine and one-half feet further west than the boundary as shown. This would make the compromise strip 39½ feet wide and make its area about 4,000 square feet in excess of the area which it is alleged the compromise ground contains. The effect of such proof would be to contradict the admission of the defendant in its answer. In no way could the west boundary line be moved nine and one-half feet to the west and still have the compromise ground thirty feet in width and contain an area of 12,844.50 square feet, unless the entire St. Louis claim is thrown over nine and one-half feet. The answer admits that the St. Louis claim is properly described, and, in fact, admits that it was located as it is described. If the compromise ground was not properly described, the description contained in the contract, judgment and deed could not be corrected in this action.

It is claimed for plaintiff in error that the words "all minerals therein contained," appearing in the judgment in the specific performance case and in the deed to the compromise ground, include and refer to the mineral in that part of the vein which has its apex within the boundaries of the St. Louis claim.

The mineral contained in a mining claim is the mineral which belongs to the claim. It not only includes the mineral beneath the surface boundaries, but also the mineral in all the veins having their apexes

within such surface boundaries, and extending in their downward course beyond the side lines. It is such mineral as the owner of the claim is authorized to extract therefrom. When a mining claim is conveyed, together with all minerals therein contained, such conveyance does not cover the mineral in a vein apexing in some other claim, because the minerals in such vein are not contained in the claim conveyed.

If we are to adopt the construction of this conveyance contended for by plaintiff in error, it would follow that the defendant in error is the owner of all that part of the Drumlummon vein the apex of which is in the St. Louis claim after it passes beyond the east bounding plane of the compromise ground. In other words, the conveyance was merely a conveyance of a slice, or section, of the vein on the dip.

Mr. Lindley in his work on Mines, second edition, volume 2, sections 616-618a, under the title, "Conveyances Affecting the Extralateral Right," learnedly discusses the subject of conveyances of mining claims with reference to the effect on the extralateral right. He cites and considers numerous authorities.

The effect of the conveyance of the compromise ground has been considered and determined by District Judge Knowles, District Judge Hunt and the circuit court of appeals for the ninth circuit. The five judges who have passed on the question, have all decided against the contention of plaintiff in error. Judge Hunt's views in regard to the matter appear in the record at page 57.

The defendant is clearly estopped from claiming that by the conveyance of the compromise ground it acquired the ore in controversy. In the specific performance case it is alleged that the purpose of the compromise agreement was to settle and agree upon the boundary

line between the Nine Hour claim and the St. Louis claim; that plaintiff in error was the owner of the compromise ground by virtue of its ownership of the Nine Hour claim. In brief, plaintiff in error proceeded in that case upon the theory that it always owned the compromise ground and was entitled to a conveyance of the legal title to that which it owned. Not having an assignment of the compromise agreement, it was necessary for it to establish this theory in order to recover a judgment. Now, instead of claiming that it received a title to that which was always a part of the Nine Hour claim and to property which it owned, it is contending that by the conveyance it not only acquired the legal title to that which it owned, but also acquired title to a vein which was owned by the St. Louis Company and constituted a part of the St. Louis claim. A party can not recover a judgment upon one theory, and, when his interests have changed, repudiate such theory and proceed upon a different basis.

Davis v. Wakalee, 156 U. S. 680.

The proof offered to show that the intention of the parties was different from the intention as alleged in the specific performance case, was properly rejected.

By the complaint in the specific performance case, and the pleadings in the present case, it is admitted that all of the area in conflict between the two claims, except the compromise ground, was a part of the St. Louis claim. It was not permissible, therefore, for the defendant to contradict its admissions by proof that the compromise ground does not contain all the ground which belonged to the Nine Hour claim.

By the compromise agreement the owners of the Nine Hour claim acquired that section of the Drumlummon vein lying south of the 133-foot plane and the apex of

which is within the compromise ground. An idea of the extent of such section can be obtained by reference to a copy of the map on page 144 of brief for plaintiff in error. The claim, therefore, that by the compromise the owners of the Nine Hour did not acquire any benefit or advantage unless the ore in controversy is held to belong to plaintiff in error is unfounded.

In conclusion we respectfully submit that when the pleadings, findings and judgment in the specific performance case, and the admissions of the defendant by its answer in the present case are fully considered, it will be found that all offers of proof were properly rejected, and that no error has been committed.

Respectfully submitted,

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